

KESAVAN SENDERAN*a***v.****PP**

HIGH COURT MALAYA, KUALA LUMPUR

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ABDUL WAHAB PATAIL J

[CRIMINAL APPEAL NO: 42-22-97]

9 JUNE 1998

CRIMINAL PROCEDURE: Appeal - Conviction - Whether grossly against weight of evidence - Whether trial judge applied maximum evaluation at end of prosecution case - End of prosecution case - Whether trial judge to give grounds of decision at end of prosecution case - Criminal Procedure Code, s. 173(f)

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CRIMINAL PROCEDURE: Prosecution - Conduct of - Whether sole prerogative of prosecution - Examination of witnesses - Failure to call or offer potential witness - Effect - Whether could give rise to adverse presumption - Evidence Act 1950, s. 114(g)

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CRIMINAL PROCEDURE: Sentence - Adequacy - Section 377A Penal Code - Carnal intercourse against the order of nature - Whether sentence of 10 years imprisonment justifiable - Whether offence so prevalent as to warrant severe sentence

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EVIDENCE: Credibility - Sexual offence - Discrepancies - Discrepancies in evidence of witnesses - Discrepancies not substantially affecting reliability of evidence - Whether trial judge wrong in not considering discrepancies

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EVIDENCE: Corroboration - Sexual offence - Child complainant - Sworn testimony - Testimony not weakened by obvious inconsistencies - Whether constituted prima facie credible evidence - Whether would add to credibility - Nature of corroborative evidence - Consideration of Thavanathan a/l Balasubramaniam v. PP - Evidence of consistency of complaint - Admissibility - Evidence Act 1950, s. 157 - Penal Code, ss. 377A, 377B

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The appellant, aged 50 years, was convicted of an offence under s. 377A Penal Code, for committing carnal intercourse against the order of nature, and was sentenced to 10 years imprisonment. It was not in dispute that the appellant's conviction, *inter alia*, was based on the sworn testimony of the complainant ('SP1') who was 16 years old at the material time. The appellant appealed against the conviction and sentence, and submitted before the learned appellate judge herein that (i) the trial judge had erred in not applying a maximum evaluation at the end of the prosecution case (ii) the prosecution had failed to call or offer a potential witness ('Anuar') and an adverse presumption under s. 114(g) Evidence Act 1950 ought to be drawn against them (iii) SP1's

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- a* evidence, not being corroborated, was not credible (iv) the evidence of corroboration, if at all, had failed the test in *Thavanathan a/l Balasubramaniam v. PP* (v) there were material discrepancies in the evidence of the other prosecution witnesses (vi) the decision was grossly against the weight of the evidence; and (vii) the sentence of 10 years imprisonment was in the circumstances unjustified.
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Held:

- c* [1] The applicable standard to be applied in the instant case is ‘proof beyond reasonable doubt’ as the charge against the appellant was filed before 31 January 1997. From his grounds of decision, it was clear that the trial judge had reviewed all of the prosecution evidence before calling for the appellant to enter his defence. The learned trial judge, hence, had applied the correct test to evaluate the evidence before him.
- d* [2] A trial judge after hearing submissions of no case to answer is only required to record an order, and there is no requirement that he must then give his grounds of decision. The grounds of decision is only required to be made when a notice of appeal has been filed. The learned trial judge was therefore not in error in recording briefly his order.
- e* [3] The prosecution has the sole charge over the conduct of prosecution. It is for the prosecution to decide which witness they would call, and neither the court nor the defence can dictate how that prosecution is to be conducted.
- f* [3a] An adverse presumption or inference under s. 114(g) of the Evidence Act 1950 can only be drawn if there is a withholding or suppression of evidence and not on account of a failure to obtain evidence. The prosecutions’s failure to call Anuar in this case, hence, cannot give rise to an adverse presumption. The defence, in any case, can always apply to call the witness to obtain evidence to raise a reasonable doubt.
- g* [4] The rule as to corroboration is a rule of prudence. Prudence requires that the evidence of a child be corroborated before being acted upon, but if the court finds no reason why the child should not be believed, it may act upon his testimony even if there is no corroboration.
- h* [4a] The fact that SP1 was a child at the time of the offence is only one factor among the many factors to be taken into account in determining the kind of reliance or credibility to be given to his sworn testimony. Be that as it may, since SP1 was 16 at the time of trial, and was able to give testimony on oath, it is untenable to argue, as the appellant did, that, because he is a minor his testimony therefore must be corroborated.
- i* These apart, it ought also to be noted that, since the sworn testimony was not weakened by obvious inconsistencies such testimony constituted *prima facie* credible evidence.

- [4a] The facts showed that the trial judge had observed SP1's demeanour, and had specifically concluded that he was a credible witness and that his testimony, in fact, was being corroborated in material particulars by other witnesses. Bearing in mind the evidence of SP3, SP4, SP5, SP6 and SP8, the learned trial judge could not be faulted for coming to these conclusions. a
- [5] What is required by the rule requiring corroboration is that there must also be corroborative evidence, not necessarily from the same source, of some material particular of the offence alleged to have been committed and of the involvement of the accused in it. This being the case, it is wrong to read in isolation the passage in *Thavanathan* that dealt with the evidence that constitutes corroboration, as it might give the impression that each corroborative evidence must independently meet all of the criteria stated therein.. *Thavanathan*, in addition, dealt with corroboration generally, and not with the other form of corroboration made admissible by s. 157 of the Evidence Act. b
- [6] The discrepancies in the evidence of the witnesses, if at all, were such that they did not substantially affect the reliability of their respective evidence. In any case, it is not enough for the appellant to merely point to a discrepancy in his submissions and to ask the court to conclude that one witness or the other is unreliable. It would also be wrong to put too much weight upon discrepancies that had emerged in examination by chance but upon which the witness had not been fairly confronted with. c
- [7] This court would only interfere if the decision of the trial judge is obviously wrong. The appellant, in the circumstances, must show that the trial judge had erred in law or in fact and that such error had led to a wrong decision. d
- [7a] The learned trial judge in the instant case had addressed his mind to the issues raised before him, and there is nothing in the judgment that is grossly against the weight of evidence. The learned trial judge's findings also involved findings of fact founded on the credibility of witnesses, and that being so, an appellate court, not having seen or heard the witnesses in examination, is certainly ill-equipped to interfere. e
- [8] A judge in fixing sentence must *inter alia* (i) look at the nature and seriousness of the offence (ii) consider the attendant circumstances, and the deliberateness with which the offence was committed (iii) give a discount for genuine regret (iv) strike a balance between the need for deterrence and the need to give the accused a chance to rehabilitate. The f
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- a* sentence of 10 years imprisonment is not manifestly wrong or excessive, but given the age and loss of the appellant, the sentence should be reduced to 7 years imprisonment.

[Appeal dismissed; order accordingly.]

b **Cases referred to:**

Ah Mee v. PP [1967] 1 MLJ 220 (*refd*)
Attan Abd Gani v. PP [1970] 2 MLJ 143 (*refd*)
Bahrani Ismail v. PP [1997] 2 MLJ 265 (*refd*)
Chean Siong Guat v. PP [1969] 2 MLJ 63 (*refd*)
Chiu Nang Hong v. PP [1965] 1 MLJ 40 (*refd*)

- c* *Chung Hwa Ying v. Phang Mun Mooi & Anor* [1987] 2 MLJ 693 (*refd*)
Karthiyayani & Anor v. Lee Leong Sin & Anor [1975] 1 MLJ 119 (*refd*)
Khoo Hi Chiang v. PP [1994] 1 MLJ 26 (*fol*)
Liew Kim Yong v. PP [1989] 2 CLJ 914 (*refd*)
Liew Wah Ming v. PP [1963] 29 MLJ 82 (*refd*)

- d* *Lim Yoon Fah v. PP* [1971] 1 MLJ 37 (*not fol*)
Loo Chan Huat v. PP [1971] 2 MLJ 167 (*refd*)
Mohamed Ali v. PP [1962] MLJ 230 (*refd*)
Mohamed Alias v. PP [1983] 2 MLJ 172 (*fol*)
Mohd Shariff v. PP [1964] 30 MLJ 64 (*refd*)
Munusamy v. PP [1987] 1 MLJ 492 (*refd*)

- e* *Ng Yau Thai v. PP* [1987] 2 MLJ 215 (*refd*)
Pie En Chin v. PP [1983] 1 CLJ 316 (*refd*)
PP v. Maarif [1969] 2 MLJ 65 (*refd*)
PP v. Nazarudin Ahmad & Ors [1993] 2 MLJ 9 (*not fol*)
R v. Baskerville [1916] 2 KB 658 (*refd*)
R v. Kilbourne [1973] AC 729 (*refd*)

- f* *Siti Aisha Ibrahim v. Goh Cheng Hwai* [1982] 2 MLJ 124 (*refd*)
Teo Chwee Geok v. Ng Hui Lip & Co [1967] 1 MLJ 245 (*refd*)
Thavanathan Balasubramaniam v. PP [1997] 2 MLJ 401 (*refd*)
Ti Chuee Hiang v. PP [1995] 2 MLJ 433 (*fol*)
TO Thomas v. Asia Fishing Industry Pte Ltd [1977] 1 MLJ 151 (*refd*)
Tua Kin Ling v. PP [1970] 2 MLJ 61 (*refd*)

- g* *Woon Ngee Yew & Ors v. Ng Yoon Thai & Ors* [1941] MLJ Rep 32 (*refd*)
Yahaya Mohamed v. Chin Tuan Nam [1975] 2 MLJ 117 (*refd*)
Yap Teng Chai v. PP [1959] 25 MLJ 205 (*refd*)
Yusoff Kassim v. PP [1992] 2 MLJ 183 (*not fol*)

h **Legislation referred to:**

Criminal Procedure Code, ss. 173(f), 294, 307(3), (6)
Evidence Act 1950, ss. 134, 114(g), 157

Other sources referred to:

Lyons Medical Jurisprudence for India, 10th edn, p 291
Sarkar on Evidence, 10th edn, p 46

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For the plaintiff - A Abraham; M/s Lachaman Lalchand & Assoc
For the defendant - Hanafiah Zakaria

Reported by Michele Saw & WA Sharif

JUDGMENT

Abdul Wahab Patail J:

This appellant had been convicted in the Sessions Court, Shah Alam of a charge that:

Bahawa kamu pada jam lebih kurang 10.00 malam 18.4.1995 bertempat di kawasan lapang berhampiran Taman Mawar Bt. 16 Rawang didalam Daerah Gombak didalam Negeri Selangor, telah melakukan hubungan seks yang bertentangan dengan peraturan tabie dengan memasukkan kemaluan kamu kedalam dubur seorang budak lelaki nama Fathi Shahrir Bin Khomshah KP: 800810-01-5411 umur 15 tahun, oleh yang demikian telah melakukan satu kesalahan dibawah seksyen 377A Kanun Keseksaan dan boleh di hukum dibawah seksyen 377B Kanun Keseksaan.

He was convicted on 8 July 1997 and sentenced to 10 years' imprisonment on this charge. Since he was 50 years old at the time of sentencing, no sentence of caning was imposed. He has appealed against the conviction and sentence.

The first issue raised on appeal is that the learned judge of the Sessions Court had erred by not applying a maximum evaluation at the end of the prosecution case:

3. Tuan Hakim yang mendengar kes telah membuat kesilapan dari segi undang-undang dan fakta, ini adalah kerana didalam penutup kes pihak pendakwa gagal membuat penilaian maksima (maximum evaluation) terhadap keterangan pihak pendakwa. Pihak pendakwa tidak mengemukakan "beyond reasonable doubt evidence to establish every essential ingredient of the Charge" seperti dikehendaki oleh (*Khoo Hi Chiang v. PP* [1994] 1 MLJ 265] dan (*Arul Pragasan a/l Sandaraju v. PP* [1977] 1 MLJ 1) iaitu untuk membuktikan *prima facie* kes.

According to the charge sheet, the appellant was first brought before the Sessions Court on 29 March 1996. According to the notes of evidence, the charge was read and a plea was taken on 27 May 1996 and trial itself commenced on 9 September 1996. This brings the case clearly within the category of cases similar to *Bahrani bin Ismail v. Public Prosecutor* [1997] 2 MLJ 265 CA. In that case, allowing the appeal, it was held:

While we appreciate that s. 180 of the CPC has now been amended to provide for a *prima facie* standard of proof at the close of the case for the prosecution, it cannot be gainsaid that that amendment has no retrospective effect. There is nothing in the amendment itself to even suggest this. Therefore, it is never in doubt that Parliament in its wisdom has not made it retrospective. Both the learned DPP and the learned counsel for the appellant conceded this. Therefore, the amendment having been gazetted on 30 January 1997 would for all practical purposes come into effect only on 31 January 1997. Thus, the amendment would only be

a applicable to cases filed after that date and not to cases before that date and this would include decided cases pending appeal. In all cases before 31 January 1997, the beyond a reasonable doubt standard of proof must of necessity apply as all along there can be only one interpretation of s. 180 of the CPC, and that is as decided by the majority decision in *Arulpragasam*.

b The applicable standard to be applied in this case then is “proof beyond reasonable doubt”.

On 4 July 1997, after hearing submissions of no case to answer, the learned judge ordered:

c Setelah mendengar segala keterangan dan hujjah-hujjah Mahkamah memutuskan bahawa Pendakwaan telah berjaya membuktikan satu kes seperti pertuduhan melampaui tahap keraguan yang munasabah; Dengan itu tertuduh dipanggil untuk membela diri seperti pertuduhan.

d The learned trial judge had therefore applied the correct standard. I strike out the words “iaitu untuk membuktikan *prima facie* kes” in this ground of appeal as being meaningless and an obvious error in the context.

e The next question is whether the learned trial judge had conducted a maximum evaluation in terms stated in *Khoo Hi Chiang v. PP* [1994] 1 MLJ 26 SC. Before proceeding any further on this question, it is useful first to refer to s. 173(f) of the Criminal Procedure Code (CPC) which provides:

If, upon taking all the evidence hereinbefore referred to, the court finds that no case against the accused has been made out which if unrebutted would warrant his conviction the court shall record an order of acquittal.

f The next section to refer to is s. 307 of the CPC, sub-s. (3) of which provides:

When a notice of appeal has been lodged the court appealed from shall make a signed copy of the grounds of decision in the case and cause the same to be served upon the appellant or his advocate ...

g In other words, the trial judge, after hearing submissions of no case to answer, is only required to record an order. There is no requirement that the trial judge has to give his grounds of decision at the time that order is made. The grounds of decision is only required to be made when a notice of appeal has been filed. The trial judge was not therefore in error in recording briefly his order as quoted earlier above from the record of evidence.

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i In terms of *Khoo Hi Chiang v. PP* (*supra*), a trial judge must conduct a maximum evaluation at the end of the prosecution case before calling for the defence. However, in practical terms, only in an appeal where a prosecution case had been dismissed at that point, would there be grounds of decision prepared so as to enable a review on appeal as to whether or not he has conducted a maximum evaluation.

In cases where the defence is called, and the trial then proceeds to its conclusion, and considering that a trial is conducted in two phases, to wit, the prosecution case to make out a case which if unrebutted would warrant a conviction, and secondly the defence adducing evidence to raise a reasonable doubt, the preferred practice is for grounds of decision to be written showing two parts corresponding with the two phases of the trial, no matter how briefly.

The trial judge had upon receipt of a notice of appeal prepared, his grounds of decision as at the end of the trial. From the grounds of decision as included in pp. 82-96, it is clear the learned trial judge had reviewed all of the prosecution evidence before concluding at p. 90:

Berdasarkan kepada keterangan-keterangan pendakwaan tersebut, Mahkamah telah memutuskan bahawa Pendakwaan telah berjaya menubuhkan kesnya seperti pertuduhan, melampaui tahap keraguan yang munasabah. Dengan itu Mahkamah memanggil pembelaan Tertuduh/Perayu.

Subsequent to that finding, the learned trial judge proceeded to give his grounds of decision in relation to the defence case.

It is clear then that the learned trial judge, in considering the prosecution case, had taken pains to consider the arguments raised by the defence and accordingly conducted a careful evaluation. I am satisfied from the grounds of decision that the learned trial judge, upon a maximum evaluation, had properly called for the appellant to enter upon his defence. In the circumstances I dismiss this first ground of appeal.

The next ground argued is contained in para. 14 of the grounds of appeal:

14. Tuan Hakim telah membuat kesilapan dari segi undang-undang dan fakta kerana mendapati kegagalan memanggil seorang, Anuar bin Baba (warden hostel) untuk memberi keterangan adalah bukan material. Sebaliknya, saksi ini adalah sangat material bagi kes ini kerana beliau merupakan orang yang pertama berjumpa dengan SP1 selepas kejadian dan merupakan orang SP1 telah beradu. En Anuar bin Baba ialah orang yang telah membuat tindakan yang selanjutnya. Dengan itu Seksyen 114 (g) Akta Keterangan telah dibangkitkan di sini. Saksi ini juga tidak ditawarkan kepada pihak pembelaan dan ini merupakan fatal bagi pihak pendakwa.

The objection taken here is that this potential witness En Anuar bin Baba had not been called as a witness, and neither has he been offered to the appellant.

It is trite law that the prosecution has sole charge over the conduct of prosecution. The Supreme Court in *Ti Chuee Hiang v. Public Prosecutor* [1995] 2 MLJ 433 SC, said:

We recognize that the function of the prosecution is to prosecute, and that does not mean that it must discharge the functions both of the prosecution and the defence.

- a* It is for the prosecution therefore to decide which witnesses they will call and which they will not. Neither the court nor the defence can dictate how that prosecution is to be conducted. At the end of the day, the court must decide only on the basis of the evidence properly adduced before it. What might or might not be said by any witness not called before it by the prosecution or the defence would be speculation and is not evidence.

- b* Section 114(g) of the Evidence Act 1950 (the Act) deals with the making of an adverse presumption in the event there is a withholding of evidence. It was made abundantly clear in *Munusamy v. Public Prosecutor* [1987] 1 MLJ 492 SC, that an adverse presumption or inference under s. 114(g) of the Act, can only be drawn if there is a withholding or suppression of evidence and not merely on account of a failure to obtain evidence. Section 114(g) does not mean that the prosecution must obtain witnesses and offer them for the defence.

- c* The Supreme Court in *Ti Chuee Hiang v. Public Prosecutor (supra)*, after the passage quoted above, had added:

d On the other hand, it is clear law that the prosecution must have in court all witnesses from whom statements have been taken, but they have a discretion whether to call them or not. (See *Teh Lee Tong v. PP* [1956] MLJ 194.)

- e* There is no evidence before the learned trial judge that evidence had in fact been taken from En Anuar bin Baba, and that such evidence has been withheld. It is on the record only that the said person was called for identification by SP1. In the absence of any evidence, established for example during cross-examination of any other prosecution witness such as the investigating officer, that the police had in fact taken a statement from the said person, s. 114(g) of the Act cannot come into operation. All that could be said in the circumstances then is that the investigation took the risk of having a weaker case by not taking a statement from the said person.

- f* The Supreme Court, in the same case, on the subject of the prosecution discretion to call only such witnesses as it requires to establish its case, said as follows:

- g* That discretion, however, must be exercised having regard in the interests of justice, which includes being fair to the accused (per Lord Parker CJ in *R v. Oliva* [1965] 3 All ER 116 Act p. 122; [1965] 2 WLR 1028 at p. 1035), and to call witnesses essential to the unfolding of the narrative on which the prosecution case is based, whether the effect of their testimony is for or against the prosecution (the Lord Roche in the Ceylon Privy Council case of *Seneviratne v. R.* [1936] 3 All ER 36 at p. 49, applied in *R. v. Nugent* [1977] 3 All ER 662; [1977] 1 WLR 789).

- h* Considering the evidence on record as a whole, the evidence of Anuar bin Baba is not **essential** to the unfolding of the narrative upon which the prosecution is based. He is not a direct witness. The evidence he could give, with regard to the charge, falls within the category of hearsay evidence, retelling what he might have

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been told by SP1. The prosecution would have to call Anuar bin Baba if there is allegation put to SP1 that what he told that person contradicts his testimony before the court. There was no such allegation put to SP1. From the record, it appears the appellant had accepted that part of SP1's testimony. Furthermore, the defence could have called this person as its own witness when the defence is called, but it had not done so. There is nothing on record that the defence had applied to call this person as its witness but that it had been objected to by the prosecution, or even that he was not available. There is no evidence the defence had been prevented from calling this person as a defence witness. It cannot be said therefore that the defence had been prejudiced by the prosecution since at the end of the day, the failure to call this person as a witness is the appellant's own failure.

I hold therefore that the non-calling of En Anuar bin Baba, in the circumstances, does not give rise to an adverse presumption and I dismiss this second ground of appeal.

The next ground argued is para. 15 which is as follows:

15. Tuan Hakim telah membuat kesilapan dari segi undang-undang dan fakta kerana gagal mengambil kira bahawa doktor pertama di klinik swasta di Rawang yang memeriksa SP1 (mangsa) tidak dipanggil oleh pendakwa untuk memberi keterangan. Sekali lagi Seksyen 114 (g) Akta Keterangan telah dibangkitkan di sini.

I would dismiss this third ground for substantially the same reasons as for para. 14 above: All that is shown is the existence of a potential witness and that not having been called by the prosecution, he had also not been offered to the defence. For s. 114 (g) to apply, it must be shown that the prosecution had in fact taken a statement from the said doctor. This could have been established by questioning the investigating officer during cross-examination. The net effect of the prosecution failure to call this doctor as a witness is that the prosecution failed to avail itself of the opportunity of corroborating that part of the testimony of SP1.

The fourth group of grounds argued together are paras. 5, 6, 7 and 12 of the memorandum of appeal:

5. Tuan Hakim telah membuat kesilapan dari segi undang-undang dan fakta kerana telah mendapati bahawa sokongan keterangan aduan SP1 (mangsa) telah disokong dengan kukuh didalam fakta matan (material facts) oleh saksi-saksi lain seperti SP3, SP4, SP5, SP6 dan SP8 serta lapuran Kimia Ekshibit P9. Pada hal, keadaan sebenarnya menunjukkan sebaliknya. Sesuatu sokongan untuk menjadi sokongan kukuh di sisi undang-undang seharusnya mempunyai elemen-elemen berikut:

- (i) dengan sendirinya boleh diterima
- (ii) dari sumber yang daripada keterangan yang perlu disokong; dan
- (iii) dalam keadaan cenderung untuk menunjukkan melalui penjelasan butir-butir maklumat bahawa bukan sahaja kesalahan tersebut telah dilakukan tetapi juga bahawa ia telah dilakukan oleh tertuduh: *Thanvathan a/l Balasubramaniam v. PP* [1997] 2 MLJ 401.

- a** 6. Tuan Hakim juga telah tersilap dari fakta dan undang-undang apabila mendapati Mahkamah berpuas hati dengan keterangan yang disokong tetapi tidak menyatakan keterangan mana yang telah disokong.
7. Tuan Hakim telah membuat kesilapan dari segi undang-undang dan fakta apabila Tuan Hakim mendapati keterangan SP6 menyokong keterangan (mangsa) SP1. Pada hakikatnya, keterangan SP6 menyokong kes Perayu kerana kesalahan berlaku pada 18 haribulan April, 1995 pada jam 9.45 p.m. dan mangsa SP1 telah diperiksa pada 19 haribulan April, 1995 yang lebih kurang pukul 10.15 pagi yang mana menunjukkan hanya 11 jam perbezaan manakala kesan lebam mengikut SP6 adalah 48 jam, justeru itu tidak berkata bahawa terdapat kemasukan ke dalam dubur SP1 (mangsa) pada malam sebelumnya. Tiada bukti-bukti kecederaan fizikal untuk menunjukkan bahawa “kemasukan” (intercourse) berlaku seperti dikatakan oleh SP1.
- b** “SWAP” yang diambil oleh SP6 tiada terdapat air mani didalam dubur SP1.
- c** 12. Tuan Hakim telah membuat kesilapan dari segi undang-undang dan fakta apabila gagal mempertimbangkan bahawa penyataan dalam laporan polis kemungkinan besar bukan dari SP1 sendiri.
- d** It was argued that since SP1 was a minor at the time of the offence, his evidence should be corroborated in material particulars. Counsel cited *Loo Chan Huat v. Public Prosecutor* [1971] 2 MLJ 167 FC, p. 168, which after referring to *R. v. Baskerville* [1916] 2 KB 658 said:
- e** That case was concerned with the evidence of an accomplice, but the principle applicable is the same whether the evidence is that of an accomplice or of a child. Though in England, if the only evidence implicating the prisoner is that of unsworn children the judge should stop the case, the law here is that such evidence can be acted upon without corroboration. The learned trial judge has rightly said so in his summing-up. Our Evidence Ordinance does not exclude it. But prudence
- f** requires that it should be corroborated.
- In that case the Federal Court was careful to record that the child concerned was 11 or 12 years old when he gave evidence, some four years later, at the trial. The child was not sworn but was cautioned by the trial judge to speak the truth.
- g** The rule as to corroboration is primarily a rule of prudence. The evidence of an accomplice is generally evaluated with care since there is the possibility that he may seek to ascribe the blame to his erstwhile partner in crime. Allegations of rape or other sexual accusations might have stemmed, for example, from a broken promise to marry. The point made is that the court should consider carefully the surrounding circumstances of the case in deciding how much corroboration it would require, to satisfy itself that there are no other motives for the allegations.
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- i** It is often said that children are prone to a fertile imagination. They may not understand the nature of an oath. For these reasons, prudence requires that their testimony be corroborated before being acted upon. But it is only a rule of prudence, and not a hard and fast rule. Children these days, no longer brought up on a reading diet of fairy tales, but of seeing motion images before their eyes on

television or in the cinema, are much less active in imagination and more adept in describing what they perceive from their senses. Indeed, their childlike innocence may enable them to describe an un-embellished truth as well as a truthful adult. It would be wrong therefore to reject summarily a child's testimony whenever there is no corroboration. It would be an injustice to the child, whose faith in the system of justice and even in himself may well be destroyed. The court must always consider the whole of the surrounding circumstances. The court must not simply dismiss his evidence but must go on to consider the evidence of that child witness with utmost care. If the court finds no reason why the child should not be believed, it may act upon his testimony even if there is no corroboration, provided of course it has at all times kept in mind the danger of acting on uncorroborated testimony alone.

In this case the learned trial judge, having considered the defence submission on this point, had said:

SP1 berusia 16 tahun, sebelum SP1 memberi keterangan di atas permohonan Peguambela, Mahkamah telah bertanya kepada SP1 samada dia faham apa perkara salah apa perkara benar serta apa erti itu sumpah. Dari pemeriksaan Utama, Balas dan Semula jelas SP1 seorang saksi yang boleh dipercayai.

... Saya tidak ada sebab kenapa untuk meragui keterangan SP1. Malah keterangan SP 1 telah di sokong dengan kukuh di dalam fakta matan (material facts) oleh saksi-saksi lain seperti SP3, SP4, SP5, SP6 dan SP8 serta laporan Kimia Eksibit P9.

The present case then is distinguishable on its facts. SP1 was 16 years old at the time of trial, was sworn in Bahasa Malaysia and understood the meaning of taking oath. It is the age of the witness appearing in court that is the basis of determination whether he could be sworn or not. If he could be sworn, he could give sworn testimony. The fact he was a child at the time of the offence, is only one factor among the many factors taken into account in determining how much reliance or credibility may be given to his sworn testimony.

The distinction is a fine one. In the case of a minor, corroborative evidence is sought, as a rule of prudence, to show whether he can be believed or not. In the case of sworn testimony not weakened by cross-examination or by obvious inconsistencies, it is *prima facie* credible evidence, and corroborative evidence merely adds to that credibility.

Since SP1 was 16 at the time of trial and was able to give testimony on oath, I reject the argument that because he is a minor at the time of the offence, the testimony of SP1 during trial, requires on that ground, corroboration.

However, there is another reason why in this case the rule of prudence would require corroboration. It is an established rule that corroboration is required in the case of offenses of a sexual nature.

- a* Generally, there is no mandatory requirement for any corroboration of a witness' evidence. Even where corroboration is normally required as a rule of prudence, for example in the case of accomplice evidence, child's evidence or in adult sexual cases, so long as it is clear the trial judge had in mind the risk of convicting on uncorroborated testimony, but nevertheless decided to do so because he was
- b* convinced of the truth of the complainant's evidence, such conviction is not illegal. No particular form of words is necessary for this purpose; what is necessary is that the judge's mind upon the matter should be clearly revealed: see *Ng Yau Thai v. Public Prosecutor* [1987] 2 MLJ 215 SC and *Chiu Nang Hong v. Public Prosecutor* [1965] 1 MLJ 40 PC.
- c* The learned trial judge had found, "Dari pemeriksaan Utama, Balas dan Semula jelas SP1 seorang saksi yang boleh dipercayai. ... Saya tidak ada sebab kenapa untuk meragui keterangan SP1." These words show that from his observation he specifically found SP1 to be a credible witness. His subsequent words, "Malah keterangan SP1 telah di sokong dengan kukuh di dalam fakta matan (material facts)
- d* oleh saksi-saksi lain seperti SP3, SP4, SP5, SP6 dan SP8 serta lapuran Kimia Eksibit P9.", does not suggest that he found the corroboration to be a pre-condition to his belief in the testimony of SP1. The learned trial judge was only saying that he found SP1 credible and that indeed his testimony was in fact corroborated in material particulars by other witnesses.
- e* But the learned trial judge had not made it clear he had at all times kept in his mind the danger of proceeding on uncorroborated testimony alone. Had he done so, that would be the end of the matter.
- f* We have therefore to consider now whether the learned trial judge was wrong in finding that there was corroboration in material particulars from the evidence of SP3, SP4, SP5, SP6 and SP8 as well as from the chemist's report, exhibit "P. 9".
- g* *Firstly I shall deal with the questions specifically raised by counsel in his submissions. They relate basically to discrepancies:*
1. Although SP3 said that SP1 was dressed in "baju Melayu", the exhibits P. 5 and P. 6 tendered were a shirt and the bottom part of a track suit.
- How much weight should one accord to this discrepancy?
- h* In *Mohamed Alias v. PP* [1983] 2 MLJ 172 it was held:
- the fact that there are discrepancies in the witness's testimony does not straight away make him an unreliable witness and make the whole of his evidence unacceptable. It is open to the court having observed the demeanour of the witness end after careful consideration of such discrepancies to accept parts of the witness's
- i* evidence if it considers them to be true.'

As to discrepancies generally, see *Chean Siong Guat v. PP* [1969] 2 MLJ 63; *Sarkar on Evidence*, 10th Edn p. 46; *Tua Kin Ling v. PP* [1970] 2 MLJ 61, 63; *Pie b. En Chin @ Mohamed b Chin v. PP* [1983] 1 CLJ 316, 316-7.

In *Pie B. En. Chin @ Mohamed bin Chin v. PP* [1983] 1 CLJ 316, Wan Yahya J (as he then was) said at 316-317:

It is only when a witness evidence on material and obvious matters in the case is so irreconcilable, ambivalent or negotional that his whole evidence is to be disregarded. Forgetfulness and failure to recall exactly certain events, which did not seem to be important to the witness, do not necessarily shake his credibility or render other parts of his story unworthy of belief. Various persons are endowed with varying powers of cognition, attentiveness and perception, so that it is not uncommon for two witnesses to a common event to describe it in slightly differing versions. Thus the slight dissimilarity between the complainant's evidence and his wife's was explicable.

The basic approach then is as follows. The sworn testimony of a witness is *prima facie* evidence. The court accepts and acts upon that evidence if it is not challenged since failure to challenge means the other party accepts it. If that part of the evidence is not accepted, that party must challenge it in cross-examination. Cross-examination is not simply repeating the same questions raised in examination in chief. He must put to or confront the witness his differing version, or with the discrepancy of that witnesses' testimony with his own previous answers or of other witnesses. The discrepancy must be pointed out to the witness and his reaction or explanation obtained. If necessary the other witness may be recalled. He may or may not have an explanation. If he has an acceptable explanation, that is the end of it. If he has not, let the court hear submissions as to the conclusions that may be derived from the discrepancy. On this point the various authorities provide valuable guides. But it is not enough to merely point to a discrepancy later in submissions, or worse even later in an appeal, and to ask the court to conclude one witness or the other is unreliable. That would be an exercise in speculation, and not a maximum evaluation for the purpose of determining the truth.

SP1 in his testimony at p. 19 had identified the "sehelai kemeja – biru" and "track bottom berwarna kehijauan". These were marked as exhs. P3 and P6. SP3 had said in cross-examination "Pakaian SP1 pada malam itu pakai baju Melayu. Saya tak pasti warnanya". In re-examination he said "SP1 berpakaian baju yang biasa dipakai oleh penuntut Sekolah Agama. Baju Melayu seluar putih". But it was not put to SP3 that SP1 had said he was wearing "sehelai kemeja – biru" and "track bottom berwarna kehijauan" and we do not have the benefit of his reaction to that description. Neither was exhs. P3 and P6, which had been admitted into evidence, shown to SP3. His mind was therefore not properly directed to the inconsistency. The ethical objective of all parties in a trial is to determine the truth, and having determined the truth, ensure that justice is done. It would be wrong therefore to put too much weight upon discrepancies that by chance emerge in examination but upon which the witness has not been fairly confronted with.

- a* The submissions of the appellant has failed to show in what manner this discrepancy of the description of the clothing worn, has in the circumstances caused the testimony of SP3 unreliable and to be rejected in toto. On the other hand, SP3 had said he saw SP1 for about five minutes. It is also in evidence that it was night, at about 10.30pm. There is no compelling reason why SP3 should remember exactly what SP1 was wearing.

- b* The evidence of SP3 stands unchallenged that SP1 had come to him at about 10.30pm asking for direction to Sekolah Menengah Agama Rawang. He could recognise SP1. SP3 also said he could see that SP1 was disturbed and sweating. While SP1 did not make any complaint to him, he, as a policeman could see that SP1 was not in a normal state. SP1 was crying. SP1's expression was described as "Air muka nya dalam keadaan cemas". His evidence also stands unchallenged that about 10 minutes later, the accused/appellant had come to him for assistance to pull his car which was stuck in the mud. This corroboration is also material in that it places the accused/appellant and SP1 within 10 minutes of one another in a location that cannot be said to be their usual haunts. His evidence as to the description of the car corroborates the evidence of SP1.

I find that it has not been shown that this discrepancy in the testimony of SP3 as to the clothes worn by SP1 has materially affected the rest of his testimony.

- e* 2. *SP4 said he was told by one student named Rizal bin Ramli (SP5) that SP1 had been taken in a car by a person named David, but SP5 said that he did not see who was in the car.*

SP 4 said at p. 33 that he was told by a student named Rizal bin Ramli (SP5). SP5 gave evidence at p. 39:

- f* ... Dalam perjalanan ke surau, ada sebuah kereta datang ke arah Dewan. Fathi pergi ke kereta itu. Kami teruskan perjalanan ke surau.

- g* Saya lihat Fathi tunggu disitu. Kereta tersebut berwarna kuning jenis Nissan. Nombor pendaftaran saya tak ingat. Saya tak nampak siapa pemandu kereta itu kali pertama saya lihat kereta itu lebih kurang 20 meter.

- h* Kami terus ke surau. Apabila kami tunggu di surau, Fathi tak datang. Kami turut patah balik tempat Fathi tinggalkan Fathi. Apabila kami tiba, saya lihat kereta itu terus keluar dengan laju, keluar daripada kawasan sekolah. Saya tak nampak siapa dalam kereta.

Kami pergi cari Fathi di Dewan Sekolah dan kawasan sekitar tetapi gagal. Kami syak sesuatu dan lapur kepada warden bertugas iaitu Encik Suhaimi.

In cross-examination at p. 41, SP5 again said:

- i* Saya yang bercakap dengan SP4. Saya beritahu SP4 Fathi sudah tidak ada. Tidak ada apa apa lain yang saya beritahu SP4.

He maintained that answer in re-examination. It was not put to SP5 directly that he had told SP4 that the appellant had taken SP1. I do not think the examination fairly put the matter to SP5. SP4 could have been recalled if the matter was of critical importance.

a

It is then clear that SP5 cannot assist as to evidence whether the appellant had been driving the car. SP5 only testified that SP1 was missing after having gone to the yellow Nissan and after the yellow Nissan had driven off. To that limited extent, the evidence of SP5 is acceptable to support the evidence of SP1, that he was taken in a yellow coloured Nissan car.

b

SP4 is a teacher at the school and is also the warden of the “asramah” of the school. SP4 confirmed that SP1 was indeed missing from the “asramah” that evening and that he was later informed that SP1 had returned. His evidence that the appellant owns a yellow coloured Nissan Sunny also corroborates the evidence of SP1 as to the car the appellant was driving that night, and this part of his evidence was not challenged in cross-examination. SP4 also corroborates the fact that SP1 made a report to the police that night.

c**d**

SP4 had in fact given evidence, elicited during cross-examination, that he was told by SP1 that the latter was taken by the appellant and of what the appellant was alleged to have performed on him: see p. 37 of the record. This remained on the record. Had SP4 been recalled and maintained his evidence that SP5 told him that SP1 was taken by the appellant, an issue of credibility of either SP4 or SP5 on the issue may arise. But he was not. The discrepancy arising from SP4’s examination in chief would appear to have been corrected by this evidence from cross-examination, and is consistent with the replies by SP5.

e**f**

The discrepancy if at all it is one, between the evidence of SP4 and SP5, does not result, in my view, in a conflict which affects substantially the reliability of the evidence of either SP5 or SP4.

Not being able to recollect the number of the yellow Nissan Sunny car does not affect the reliability of their evidence also. It is not so unbelievable. It was night. The number of the car is not the issue, although to have the number might be useful evidence. Similarly, the number of students in the group going to the surau was also merely a minor side issue. SP1 has spoken of himself with three “kawan-kawan” but SP5 had spoken of himself together with “lima pelajar lain”, and no issue was made of it in the cross-examination of SP5.

g**h**

3. *It was submitted that the evidence of corroboration in this case failed the test of Thavanathan a/l Balasubramaniam v. PP [1997] 2 MLJ 401 SC, which dealt with what evidence would constitute corroboration at p. 419:*

1. it must in itself be admissible;
2. come from a source independent from the evidence requiring to be corroborated; and

i

- a* 3. be such as to tend to show, by confirmation of some material particular, not only that the offence charged was committed, but also that it was committed by the accused.

b Corroborative evidence need not all come from one source. It is more in the nature of things that evidence come in bits and pieces from a number of different sources, which taken together make up a whole. That the corroborative evidence must in itself be admissible is trite law. Hearsay evidence for example, cannot normally be accepted as corroboration. It has been held there need not be corroboration in every particular or detail: see *Attan bin Abdul Gani v. PP* [1970] 2 MLJ 143. It is wrong then to read the passage from *Thavanathan a/l Balasubramaniam v. PP* in isolation, as it might be wrongly be read that each corroborative evidence must independently meet all of the criteria. Indeed immediately before the passage quoted, the Supreme Court, discussing the subject of independent testimony, had stated:

d The corroborating evidence must confirm the evidence requiring corroboration in at least one particular which is directly relevant to the issues in the case in that it tends to suggest not only that the offence charged has been committed but also that it has been committed by the accused. Such corroborating evidence may be direct or circumstantial.

e All that is required is that there must also be corroborative evidence, not necessarily from the same source, of some material particular of the offence alleged to have been committed and of the involvement of the accused in it.

In addition, *Thavanathan a/l Balasubramaniam v. PP* dealt with corroboration generally. The case did not deal with the other form of corroborative evidence made admissible by s. 157 of the Evidence Act 1950 itself:

f 157. Former statements of witness may be proved to corroborate later testimony as to same fact.

g In order to corroborate the testimony of a witness, any former statement made by him whether written or verbal, on oath, or in ordinary conversation, relating to the same fact at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved.

h Generally in cases with a victim, and particularly so in sexual cases where there is rarely a third party as a witness, the crucial issue is the credibility of the victim giving evidence as the complainant. Experience from cases show the truth can be demonstrated by corroboration of his evidence in material particulars, although not necessarily in all particulars. Independent corroboration of material particulars proves that his evidence is true. That independent corroboration can be by evidence of witnesses who saw what had happened, witnesses who could support other parts of the testimony and evidence of experts such as chemists or doctors who examined the victim or other evidence of the alleged crime, thereby suggesting that the testimony is likely to be true.

i

In the absence of, or in addition to, independent corroboration, evidence of the consistency of his complaint can amount to evidence of credibility. It is evidence that the complainant has maintained at all times the same story, thereby indicating the likelihood that the complaint is true. Otherwise irrelevant, it was made admissible by s. 157 of the Evidence Act 1950. Since the source is the victim himself, it cannot be said to be from a source independent of the evidence to be corroborated, which is the victim's evidence. Under case law it would have been irrelevant, except as proof of consistency of the complaint.

These are simply rules of common sense and prudence. In *R v. Kilbourne* [1973] AC 729 at 750, Lord Reid said:

There is nothing technical in the idea of corroboration. When in the ordinary affairs of life one is doubtful whether or not to believe a particular statement one naturally looks to see whether it fits in with other statements or circumstances relating to the particular matter; the better it fits in, the more one is inclined to believe it. The doubted statement is corroborated to a greater or lesser extent by the other statements or circumstances with which it fits in.

The essence of corroborative evidence is that it 'confirms', 'supports' or 'strengthens' other evidence in the sense that it renders [that] other evidence more probable. In *Peacock v. The King* [9], O'Connor J said:

... it may be asked, what is corroboration? It does not mean that all the material facts have to be proved by independent evidence. What it does mean is well expounded in the following passage from the last edition of Russell on *Crimes* (7th ed) at 2287: 'The confirmation need not extend to every part of the accomplice's evidence, for there would be no occasion to use him at all as a witness, if his narrative could be completely proved by other evidence, free from suspicion. But the question is, whether he is to be believed upon points which the confirmation does not reach. And if the jury find some part of his evidence satisfactorily corroborated, this is a good ground for them to believe him in other parts as to which there is no confirmation. So far all the authorities agree; the only point on which any difference of opinion has been supposed to exist relates to the particular part or parts of the accomplice's testimony which ought to be confirmed.'

The Federal Court in *Ah Mee v. PP* [1967] 1 MLJ 220, had this to say at p. 222:

With respect, corroboration in the legal sense connotes some independent evidence of some material fact which implicates the accused person and tends to confirm that he is guilty of the offence: see *R v. Clynes* [1960] 44 Cr App R 158 at p. 161. Consistency is not such corroboration and s. 157 of the Evidence Ordinance should be read in the light of my exegesis thereof in the case of *Mohamed Ali v. PP* [1962] MLJ 230 at p. 231 ...

Ong J in *Mohamed Ali v. PP* [1962] MLJ 230 (at p. 231) had said:

- a* It will not be out of place here to say a few words about s. 157 of the Evidence Ordinance. Admissibility of a previous statement under that section must not be confused with the weight to be given to it. Corroboration, strictly speaking, means independent corroboration as explained in *R v. Baskerville* [1916] 2 KB 658. In my opinion true corroboration by independent evidence from an extraneous source should be distinguished from ‘corroboration’ as it appears in s. 157, which rests
- b* on the principle that consistency between a previous statement by a witness and his present evidence may afford some ground for believing him. The value of such a statement as corroboration may be infinitesimal, as in the majority of cases it is. On the other hand, by reason of the abundance of detail it may contain as to the facts and circumstances surrounding any relevant transaction, it may be capable
- c* of being cross-checked for truthfulness against other relevant evidence, in which case, of course, it may be effective corroboration, but only because it has been shown to be true.

The Court of Appeal in *Liew Wah Ming v. PP* [1963] MLJ 82 applied *Mohamed Ali v. PP (supra)* and Hill JA, who wrote a separate judgment, had this to say (at p. 84):

- d*
- Section 157 is clear and unambiguous and there can be no doubt that in the circumstances laid down in that section a former statement made by a witness is admissible to corroborate his testimony and with the object of showing consistency. But the weight or value of such a statement as corroboration must always be a
- e* question of fact and no hard-and-fast rule, capable of mechanical application, can be laid down.

Raja Azlan Shah FJ (as His Majesty then was) in *Karthiyayani & Anor v. Lee Leong Sin & Anor* [1975] 1 MLJ 119 said (at p. 120):

- f* It is settled law that a person cannot corroborate himself but it would appear that s. 157 of the Evidence Act enables a person to corroborate his testimony by his previous statement. The section adopts a contrary rule of English jurisprudence by enacting that a former statement of a witness is admissible to corroborate him, if the former statement is consistent with the evidence given by him in court. The
- g* rule is based on the assumption that consistency of utterance is a ground for belief in the witness’s truthfulness, just as inconsistency is a ground for disbelieving him. As for myself, although the previous statement made under s. 157 is admissible as corroboration, it constitutes a very weak type of corroborative evidence as it tends to defeat the object of the rule that a person cannot corroborate himself. In my opinion the nature and extent of corroboration necessary in such a case must
- h* depend on and vary according to the particular circumstances of each case. What is required is some additional evidence rendering it probable that the story of the witness is true and that it is reasonably safe to act upon it. If a witness is independent, ie, if he has no interest in the success or failure of a case and his evidence inspires confidence of the court, such evidence can be acted upon. A witness is normally to be considered independent unless he springs from sources
- i* which are likely to be tainted. If there are circumstances tending to affect his impartiality, such circumstances will have to be taken into account and the court

will have to come to a decision having regard to such circumstances. The court must examine the evidence given by such witness very carefully *Anuar* scrutinize all the infirmities in that evidence before deciding to act upon it.

a

From the evidence at p. 18 of the record of evidence, the first person the complainant had related the events to is Anuar bin Baba. The other person is the doctor in the private clinic. The complaints made to these persons, being made earlier is much less likely to have been embellished by the language, questions and reactions of other persons, and is therefore more valuable for purposes of evidence of consistency. The subsequent police report merits much less value. Indeed, the failure to call those two persons denied the court the opportunity to evaluate if the police report had been and if so to what extent, embellished. In the circumstances, the police report must be given very little corroborative value.

b**c**

SP6 Dr. Ariza Bt. Adnan had examined SP1 the following morning at 10.15am. It was argued that while SP6 found redness around the anus of SP1, she was unsure as to the cause of it and had said it could be caused by constipation or scratching; that there was no laceration or tear and in the case of a first time, it is likely there be a tear. Counsel also argues that while she had said spermatozoa would last 72 hours, there was no evidence of spermatozoa on SP6. On this issue, it was pointed out, SP1 had said he had felt a discharge of semen.

d

Superficially, there appears to be contradiction. However, SP6 did not say there must be a tear, but only that it is likely. In other words the absence of a tear does not exclude entry. That such redness could have been caused by other means is not entirely relevant since it does not exclude the likelihood that it could be caused by the act complained of. The evidence of SP6 must be taken as a whole. SP6 said “Saya juga membuat propostoty untuk memeriksa kawasan dalam dubur. Saya dapati kesan lebam pada posisi jam 2. Dari pemeriksaan tersebut saya berpendapat kesan kemerahan didibur boleh disebabkan oleh trauma dan kawasan lebam di dalam dubur boleh disebab oleh sesuatu yang keras dan tumpul” while it may have been caused by constipation. There is no evidence raised in examination or cross examination that the complainant had constipation. In absence of any such evidence, constipation as a cause is mere speculation. That is insufficient to raise a reasonable doubt.

e**f****g**

SP1’s evidence is that he felt a discharge of semen. It was not made clear in examination of SP1 that the discharge was internal or external. There was positive indication of spermatozoa on the track bottom.

h

In the circumstances, I conclude then that there is sufficient corroboration of entry. I shall return to this issue later.

i

- a* 4. That the appellant was impotent and therefore incapable of committing the offence.

b SP7 was the doctor who examined the accused. He conducted the so-called “potency test” on the accused and found that he failed to obtain an erection. SP7 recommended that the accused be sent to the Kuala Lumpur Hospital to be tested but the investigating officer (SP8) had failed to do so. It was acknowledged by SP8 that accused was examined four times by SP7. The argument then goes that because the accused failed the potency test, he was incapable of having an erection, and in such event was incapable of committing the offence as charged.

c To my mind, the potency test merely showed that the doctor failed to obtain an erection from the accused when he tested the latter. In other words, the doctor is not reporting on something found or observed by him on the accused such as in the case of the usual medical examination. The potency test requires a reaction from the accused, who knows very well it would not look good if he does show an erection. Any reaction would have been involuntary. In other words such a

d potency test actually shows the doctor is able to obtain an involuntary erection from the accused, not whether the accused is capable of achieving an erection.

The results of the potency test would merely be one of the many pieces of evidence taken into consideration in deciding whether to believe the evidence of

e SP1. The fact the doctor is not able to obtain an erection from the accused cannot be taken in isolation to necessarily exclude i) any possibility of an erection and ii) therefore the ability to commit the offence as charged.

- f* 5. That while the learned trial judge had said there was corroboration, he had not stated which parts of the testimony of SP1 was corroborated.

As I have alluded to earlier, in a case where the charge depends upon the evidence of the victim, the central issue is the credibility of the victim as a witness in court. Believing him becomes much easier if all of his evidence is corroborated. The work of the appellate court also becomes easier if the trial judge does set out,

g even if in brief terms, the matters that he considers are corroborative of the evidence of the main witness. The parties and the appellate court would find it easier to understand the decision.

The learned trial judge has not set out in his grounds of decision the corroboration in detail.

h

The defence argument is that a trial judge should set out the grounds the corroboration that he relies on so that it is possible to evaluate whether the corroboration affecting his decision is material. The submission, as I understand it, is that if the corroboration relied upon is not set out, then the finding is

i defective, and should be set aside.

On the other hand, the whole of the evidence is on record. The trial judge, in saying there was corroboration, had made it clear that he had considered the issue of corroboration. The appellate court is itself not precluded from considering the whole of the evidence on the record in order to determine whether the conclusions of the trial judge is supported or not. Such an approach would avoid ordering a retrial and incurring further cost on the accused to defend himself in a fresh trial. Where the record of evidence shows that an offence had been committed, it is not in the public interest that an accused should be acquitted merely on the technicality that the detailed reasons had not been set out by the trial judge. In *Bahrani bin Ismail v. Public Prosecutor* the appellate court, reviewing the record, quashed the conviction and proceeded to convict and sentence the appellant on another charge.

In this judgment, in dealing with the grounds of appeal in this case, I have necessarily reviewed the record of evidence as to corroboration.

6. *That the police report is not in the words of the complainant.*

The last ground in this grouping is that the police report (exh. P1) is not, by the use of terms such as “0900 hours” is not in the words of the complainant SP1, and as such could not be relied upon. Two cases were cited by counsel. The first case cited is *Liew Wah Ming v. PP* [1963] 29 MLJ 82 CA. That case however was on corroboration of a child’s evidence. The child was seven to eight years old at the time of the trial. It was a trial before a jury. The case referred to s. 157 of the Evidence Ordinance 1950 (now Evidence Act 1950). It was held:

Section 157 is clear and unambiguous and there can be no doubt that in the circumstances laid down in that section a former statement made by a witness is admissible to corroborate his testimony and with the object of showing consistency. But the weight or value of such a statement as corroboration must always be a question of fact and no hard-and-fast rule, capable of mechanical application, can be laid down. While, therefore, the former statement of an accomplice or, as in the present case, of a child is admissible to corroborate his testimony and to indicate consistency the weight to be attached to it must vary with the facts of each case.

Although termed corroboration, such corroboration under s. 157, is admissible therefore to corroborate testimony and to indicate consistency, the weight to be attached to which must vary with the facts of each case. In *Liew Kim Yong v. PP* [1989] 2 CLJ 914, the court of Criminal Appeal in Singapore, considered evidence of a complaint to a sister on the telephone and subsequently a complaint to the mother, sister and a friend and admitted the same under a comparable section of the Singapore Evidence Act. There it was held that the trial judge had properly regarded such evidence as corroboration, confirming in material particulars, not only that the complainant had been raped but also of the identity of the rapist.

- a* The second case cited is *Karthiyayani & Anor v. Lee Leong Sin & Anor* [1975] 1 MLJ 119 FC. It was held that such corroborative evidence constitutes a very weak type of corroborative evidence as it tends to defeat the object of the rule that a person cannot corroborate himself.
- b* The police report (exh. P1), like the narration by a witness of what he had been told by the complainant, is the evidence of the witness who took down the report, or the witness giving evidence of what he was told by the complainant. As such it cannot and it need not necessarily be in the exact words of the complainant. The trial judge must decide the weight to be accorded to such evidence, which will depend upon the particular circumstances of each case.
- c* In reviewing exh. P1, I note that the police report was made approximately three to four hours after the alleged incident, and apart from the method of reference to time, is consistent with the evidence of SP1 in court. There is no material advanced to support the objection advanced by counsel on exh. P1, suggesting
- d* the report does not accurately reflect what the complainant reported. Given that it was a report by the victim so soon after the alleged incident, I find no objection to the learned trial judge relying upon it for some corroboration.
- I regret the submission “bahawa pernyataan dalam laporan polis kemungkinan besar bukan dari SP1 sendiri” since apart from the method of reference to time, there
- e* is no evidence whatever, raised in cross-examination of SP1 or by any other evidence advanced, that the report is made by any person other than the complainant SP1 himself.
- I would therefore reject this group of grounds of appeal.
- f* The next group of grounds raised are as in the following paragraphs of the memorandum of appeal:
- g* 4. Tuan Hakim tersilap dari segi undang-undang dan fakta apabila Tuan Hakim mendapati keterangan pendakwa adalah mencukupi untuk membuktikan elemen kemasukan (penetration) yang perlu bagi kesalahan dibawah Seksyen 377A Kanun Keseksaan.
8. Tuan Hakim telah membuat kesilapan dari segi undang-undang dan fakta apabila beliau tidak mempertimbangkan keterangan SP7 dimana ujian “Potensi” telah dibuat empat (4) kali dan Perayu gagal mencapai “ereksi”. SP7 juga gagal dalam ujiannya. Kegagalan ujian Potensi SP7 dan penyakit kencing manis tidak diambil kira.
- h* 9. Tuan Hakim juga telah tersilap dari fakta dan undang-undang kerana menerima keterangan perubatan sebulat-bulat tanpa mengambilkira elemen-elemen kesalahan.
10. Tuan Hakim telah membuat kesilapan dari segi undang-undang dan fakta apabila tidak mempertimbangkan bahawa SP1 adalah seorang saksi yang tidak
- i* “credible” dan telah membiarkan SP1 untuk memberikan keterangan yang “highly prejudicial” yang mana bercanggah dengan keterangan SP4.

11. Tuan Hakim telah membuat kesilapan dari segi undang-undang dan fakta apabila gagal mempertimbangkan bahawa terdapat seorang lagi terlibat dalam kes ini seperti yang telah dikatakan dalam keterangan SP1.

a

Grounds 4, 8 and 9 refers to proof of penetration. It was submitted that because the doctor cannot positively say there was penetration, the offence had not been proved.

b

The submission that there is no evidence of penetration is, in my view, erroneous. There is of course no independent corroborative evidence of penetration. There is however the s. 157 Evidence Act 1950 corroboration in the form of a police report made about three to four hours later: see p. 1.

c

In my view the learned trial judge cannot be said to have erred in relying on exh. P1 as corroboration, and giving it weight, since it was made approximately three to four hours after the alleged incident. There is no evidence whatsoever that the report was made by any person other than the complainant SP1. Similarly the complaint to SP4, evidence of which was put into evidence by the defence in cross-examination. Furthermore, at the end of the day, SP1 when giving evidence at the trial had given evidence on oath. There are no obvious discrepancies in his evidence, and the learned trial judge had specifically found:

d

SP1 berusia 16 tahun, sebelum SP1 memberi keterangan di atas permohonan Peguambela, Mahkamah telah bertanya kepada SP1 samada dia faham apa perkara salah apa perkara benar serta apa erti itu sumpah. Dari pemeriksaan Utama, Balas dan Semula jelas SP1 seorang saksi yang boleh dipercayai.

e

... .. Saya tidak ada sebab kenapa untuk meragui keterangan SP1. Malah keterangan SP1 telah di sokong dengan kukuh di dalam fakta matan (material facts) oleh saksi-saksi lain seperti SP3, SP4, SP5, SP6 dan SP8 serta lapuran Kimia Eksibit P9.

f

Since the trial judge has the unique opportunity of evaluating the credibility of the witness, being able to observe the witness in examination-in-chief, cross-examination and in re-examination, an appellate court would not normally interfere with the finding unless there are clear contradictions or discrepancies from the rest of the evidence: *Chung Hwa Ying v. Phang Mun Mooi & Anor* [1987] 2 MLJ 693 SC; *Siti Aisha binti Ibrahim v. Goh Cheng Hwai* [1982] 2 MLJ 124 FC; *TO Thomas v. Asia Fishing Industry Pte Ltd* [1977] 1 MLJ 151 FC; *Yahaya bin Mohamed v. Chin Tuan Nam* [1975] 2 MLJ 117 PC; *Teo Chwee Geok v. Ng Hui Lip & Co* [1967] 1 MLJ 245 FC; *Woon Ngee Yew & Ors v. Ng Yoon Thai & Ors* [1941] MLJ Rep 32. In this case, while there may be a lack of corroboration, there are little if any, material contradictions or discrepancies.

g

h

A more substantial objection is raised in ground 10. Counsel pointed out the following at the top of p. 27 of the record:

i

- a** Saya faham perkataan meliwat, ianya haram dari segi agama. Lelaki boleh buat dengan lelaki lain atau isterinya melalui lubang dubur. Azahar ada beritahu saya OKT telah meliwatnya. OKT suruh Azahar mengulum kemaluan OKT.
- Peguam Bela: Bantahan. Hear Say. Bad Character
- b** TPR: Bukan bad character evidence tetapi untuk clarify kejadian Azahar Dibuang Asrama.
- Court: Bantahan diterima. Memadai dengan keterangan yang ada bahawa Azahar dibuang asrama kerana ada melakukan hubungan homoseks dengan OKT.
- c** The evidence admitted is in fact inadmissible as hearsay, and it could be said to be prejudicial to the case for the defence. It ordinarily ought not to have brought into evidence. The learned trial judge, having sustained the objection, noted:
- Memadai dengan keterangan yang ada bahawa Azahar dibuang asrama kerana ada melakukan hubungan homoseks dengan OKT.
- d** This appears a little strange. However the answer seems to be at the bottom of p. 24 of the record:
- Nor Azahar dibuang asrama kerana ada buat hubungan homoseks dengan OKT. Selepas kejadian di tandas Dewan itu, semua orang tahu dan Sekolah buang Azahar daripada asrama.
- e** No objection was made to this piece of evidence, and the learned trial judge's ruling brought matters back to this point. Indeed the evidence relating to Azahar being dismissed for homosexual relationship with the appellant, and being objected to above, had in fact been introduced by the defence during cross examination of SP1. This is found at pp. 23 to 24 of the record:
- Sebelum 18.4.95 saya telah berjumpa OKT banyak kali tapi tak pasti berapa kali. Saya bukan kawan rapat OKT. Saya ada beritahu OKT tentang kejadian-kejadian di hostel. Saya tak pernah jumpa OKT untuk dapatkan nasihat daripadanya.
- g** Saya kenal seorang rakan saya di hostel yang sama bernama Azahar Alimin. Dia ada di luar Mahkamah hari ini.
- Court: NOR AZAHAR BIN ALIMIN - Dipanggil dan dicamkan.
- h** Dia berada dalam Tingkatan 4 dan saya Tingkatan 3 ketika itu. Pada suatu hari ada persembahan di Dewan, saya pergi melihat, apabila tiba di dewan, saya lihat OKT keluar dari tandas dewan sambil menghisap rokok. OKT keluar berjalan terus. Saya masuk ke tandas, saya lihat lampu tandas ditutup - gelap. Saya lihat Azahar sedang membetulkan seluarnya dalam gelap.
- i** Saya tanya Azahar, apa dia buat dalam tandas itu. Azahar menangis. Dia kata dia akan beritahu saya apa hal sebenar di hostel nanti. Kami berdiri terus keluar tandas itu.

Azhar pernah digantung daripada Asrama. Keluar Asrama, kerana dia melakukan hubungan sejenis (homosex) dengan OKT. Saya tak setuju Azahar digantung/buang daripada asrama kerana ada hubungan sex dengan saya. (Saksi terkejut Ha! Sebelum menjawab soalan).

a

Saya ada kawan bernama Rizal bin Ramli. Dia kawan baik saya. Tiada apa-apa tindakan oleh Sekolah terhadap Rizal.

b

Saya tak kenal Nazrin. Saya tak setuju saya ada hubungan sex dengan Rizal. Saya tak ceritakan apa-apa tentang Rizal kepada OKT. Saya tak tahu apa jadi terhadap Nor Azahar selepas dia dibuang daripada Asrama.

Saya tak pasti berapa lama saya bercakap dengan OKT dalam kereta dekat dewan pada malam itu. OKT hidupkan enjin dan terus keluar kawasan sekolah. Saya tak dengar kawan-kawan saya yang lain panggil untuk pergi belajar ke surau.

c

It is abundantly clear that it was the defence that spent much time and effort to include into the record the evidence relating to such sexual activity. That having been done, it was not improper for the prosecution in re-examination to have elicited clarification.

d

Having perused with care, not once but again and again, the record of evidence and the grounds of decision of the learned trial judge, and I do not think that his conclusion was solely affected by the admission of this evidence alone.

e

It is submitted before this court “terdapat seorang lagi terlibat dalam kes ini seperti yang telah dikatakan dalam keterangan SP1”: see ground 11. At p. 17 of the record there is the following passage from the evidence of SP1:

Apabila kereta OKT lekat disitu, dia suruh saya balik jalan kaki. Saya jalan sekerat jalan, saya jumpa orang tengah basuh kereta depan rumahnya di Taman Mawar, saya tanya dia macam mana hendak balik ke sekolah saya. Saya boleh cam orang itu.

f

Court: L/KPL 94372 Anuar bin Ahmad dicamkan.

Dia beritahu saya jalan balik ke Sekolah Agama. Saya teruskan perjalanan. Saya berjalan kaki sehingga ke pondok Jaga sekolah saya. Kemudian ada seorang lalu naik motosikal. Saya tumpang orang itu masuk ke kawasan Asrama. Saya tiba ke Hostel lebih kurang tengah malam.

g

Di Hostel, semua penghuni hostel berkumpul didataran depan hostel kerana mereka mencari saya - buat roll call.

h

The allegation is that the person riding the motorcycle is involved in this case. But the appellant did not cross examine SP1 on this issue. Neither was it put to him that it was the motorcyclist and not the accused who committed the act complained of. The allegation was first raised in submission of no case to answer: see p. 61 of the record. Not having been put to the witness, and giving the witness opportunity to clarify the matter, the issue is purely speculative. The learned trial judge had therefore quite properly ignored the matter.

i

- a* 16. Tuan Hakim juga telah membuat kesilapan dari segi undang-undang dan fakta kerana gagal mengambil kira keterangan SP3 mengatakan SP1 dan Perayu tidak datang dari arah yang sama atau bersama dan SP1 sedang memakai Baju Melayu seluar.

b Ground 16 argues that the learned trial judge had failed to consider in the evidence of SP3 that the appellant and the complainant SP1 had not been seen together, or come from the same direction, and that according to SP3, SP1 was wearing “baju Melayu”. The last point has been dealt with earlier above, and I will not deal with it further.

c SP3 had said in examination-in-chief (p. 29):

d Pada 18.4.95 jam lebih kurang 10.30 malam saya berada di hadapan rumah saya No. 37, Jalan 11A Taman Mawar Rawang. Saya sedang cuci kereta saya ketika itu ada seorang budak lelaki datang melintasi rumah saya. Saya tanya datang dari mana. Dia cakap dia datang dari atas bukit dekat situ. Saya tanya namanya tetapi dia diam tak jawab. Dia kata dia datang dengan David. Dia tanya kepada saya arah ke Sekolah Menengah Agama Rawang. Saya tunjukkan arah ke sekolah tersebut. Saya boleh cam budak lelaki tersebut.

Court: SP1 dicamkan.

e Selepas itu SP1 terus berjalan dari situ. Selepas itu saya teruskan kerja saya. 10 minit kemudian datang seorang lelaki David. Saya kenal David ini sebelum itu ...

The car was stuck, according to SP3 about 12 feet from a surau. There was no one at the surau at that time, about 10pm. He also said:

f Kawasan tersebut adalah kawasan lapang, tanah baru ditolak, berbecak. Tempat itu tiada rumah orang.

In cross-examination he explained:

Dekat sura(u) itu tiada rumah, cuma kawasan lapang. Disitu ada jalan naik ke kebun diatas kepada surau tersebut.

g In re-examination he said:

Saya nampak arah David datang semasa dia minta tolong jiran saya. Saya lihat dia datang berjalan dari arah surau.

h It is clear then that the appellant’s car was stuck near a surau, and from the surau there is a road to a “kebun” above it. SP3 saw the appellant come from the direction of the surau. SP1, according to SP3, told him that he came from the direction of a “dari atas bukit dekat situ”. There is no evidence whatsoever, as suggested in this ground 16, that SP1 and SP3 came from different directions. It was never put to SP1 or SP3 for that matter, that the accused and SP1 came from different directions. There is no evidence of another hill in another direction. From the evidence, both the hill area and the surau are in the same direction from the point of view of SP3.

i

I reject therefore this ground of appeal.

a

17. Tuan Hakim yang telah mendengar kes ini tersilap dari segi undang-undang dan fakta apabila mendapati pihak pendakwa telah berjaya membuktikan kes melampaui keraguan yang munasabah (“beyond Reasonable Doubt”).

18. Tuan Hakim telah membuat kesilapan dari segi undang-undang dan fakta apabila gagal menilai maksima keterangan-keterangan saksi dan keterangan-keterangan lain pendakwa. Jika penilaian kukuh dibuat, Tuan Hakim akan mendapati semua ingredient kesalahan tidak dibuktikan dan pihak pendakwa tidak membuktikan *prima facie* kes. Oleh kerana itu, Pembelaan tidak patut dipanggil.

b

In oral submissions, in relation to grounds 17 and 18, counsel submitted that thus ingredients of the offence had not been proved, and therefore the defence should not have been called.

c

Reviewing the prosecution evidence as it stood at the end of the prosecution case, I cannot say that the learned trial judge, applying the maximum evaluation and the standard of proof beyond reasonable doubt, cannot have arrived at the conclusion that he did at the end of the prosecution case. There was material corroboration in many material particulars. The fact that the evidence of SP1 is supported in many other material particulars, establishes him as a credible witness, such that his testimony that there was penetration, even if to that extent uncorroborated, could be believed. The learned trial judge found as a fact that SP1 is a credible witness and he found no reason not to believe him.

d

e

Section 134 of the Evidence Act 1950 provides that no particular numbers of witnesses shall in any case be required for the proof of any fact. In other words, there is no law to say that the testimony of one witness only is not sufficient to prove a fact.

f

I hereby reject these grounds of appeal.

The next ground of appeal is as follows:

13. Tuan Hakim telah membuat kesilapan dari segi undang-undang dan fakta apabila gagal mengambil kira bahawa Mahkamah memerlukan keterangan-keterangan yang paling terbaik. Malangnya, keterangan-keterangan yang paling terbaik tidak diperolehi kerana penyiasatan yang lemah. Ianya dikatakan penyiasatan yang lemah oleh sebab:

g

a. Pegawai Penyiasat SP8 tidak pergi ke tempat kejadian sebaik sahaja laporan polis dibuat seperti dikehendaki oleh undang-undang dan juga tidak membuat semua obligasi yang sepatutnya dibuat. SP8 juga tidak memberi perhatian yang sepenuhnya terhadap ekshibit-ekshibit yang terlibat dalam kes ini.

h

b. SP8 juga gagal mengemukakan ekshibit (“selipar”) yang dijumpai di tempat kejadian seperti dikatakan oleh SP1 di Mahkamah.

i

c. SP8 gagal membawa ke Hospital Kuala Lumpur seperti dikehendaki oleh SP7 untuk ujian “potensi”.

- a* d. Dengan itu, Tuan Hakim sepatutnya tidak boleh mengendahkan testimoni SP8 kerana SP8 tidak menjalankan siasatan yang sepenuhnya dan cara-cara pengendalian ekshibit-ekshibit mengakibatkan talian keterangan diputus (chain of evidence has been broken).
- b* The objection here is in regard to the standard of investigation and the argument that the prosecution had not put before the court the best evidence. It was argued that while SP8 interviewed SP1 in his office, he did not take possession of SP1's clothes, but told SP1 to bring his clothes the next morning. There is little merit in this argument. The interview was after 1.30am and it was on record that the complainant had not brought his clothes. It was therefore not improper to ask him
- c* to bring his clothes later that morning.
- Counsel took issue that SP8 having gone to the scene at 1.15pm the next day, and noticed tyre marks, he did not establish to whom does the tyre belong since SP3 had said that he drove his car and later a crane to the scene. It was submitted
- d* there was also a motorcycle, all of which had tyres.
- I do not see the relevance of the tyres. It was in the evidence of SP3 that during the day-time, there are many passersby in that area.
- It was also argued that SP1 had said that these had taken photographs, a slipper, and tissue paper; and that the slipper belonged to the accused. But the slipper
- e* was never produced. As I have dealt with earlier, it is the discretion of the prosecution to produce the evidence that they wish to prove their case. If they were unable to link the slipper to the accused, the prosecution is entirely right in not producing the slipper. To do so and engage in an inquiry as to why they are unable to link the slipper to the accused, would in my view be a red herring and
- f* a waste of time.
- The court should confine itself to evaluating the evidence that is placed before it objectively and should not engage in mere speculation. Similarly an investigation and presentation of evidence by the prosecution, as the counsel submits the
- g* prosecution ought to do, such as to whether SP1 had gone to the clinic, whether he was given medicine, or whether SP1 had obtained a card from the school to go to the clinic are also in my view irrelevant to the prosecution case. If it were part of the defence case, it is for the defence to prove such facts as to dispute the evidence of SP1 so as to raise a reasonable doubt. But it is not necessary for
- h* the police or the prosecution to engage in an ever widening area of investigation beyond the initial report. It is inconceivable, other than perhaps in a police state, that the police have the man-power resources to be devoted to such activity.
- The other objection is in regard to the chemist report, where the exhibits were sent to the chemist nearly a year later. If anything this should not be a defence
- i* ground of objection. It was a benefit to the defence. If one were to speculate, the absence of sperm or seminal stains on the tissue paper may well be credited to the delay in obtaining the chemist report.

However it is erroneous to say that the exhibit upon which the seminal stains were found was not properly established to be the one SP1 was wearing. The submission ignores the evidence of SP1 identifying the track bottom Exhibit P. 3, and the supporting evidence of SP8 that those were the clothes passed to him by SP1.

a

Counsel had referred to some text entitled “*Lyons Medical Jurisprudence for India*” 10th Edn p. 291 that wet seminal stains decompose in 24 hours and that this renders the spermatozoa unrecognizable. Be that as it may, there is no evidence that the trousers being the exhibit upon which seminal stains was detected had been wet. This had not been suggested by the defence at any time. Even if wetness renders spermatozoa unrecognizable, the issue here was not finding of spermatozoa *per se*, but of the presence of seminal stains on the trousers.

b**c**

The next grounds of appeal submitted upon were grounds 19, 20, 21 and 22:

19. Tuan Hakim tersilap dari segi undang-undang dan fakta kerana telah meletakkan suatu beban bukti yang lebih berat keatas Perayu daripada dikehendaki oleh Undang-Undang.

d

20. Tuan Hakim juga telah tersilap dari segi undang-undang kerana gagal menimbang atau tidak langsung mengambil kira keterangan pembelaan yang telah menimbulkan keraguan dalam kes pendakwa.

e

21. Tuan Hakim juga telah tersilap dari segi undang-undang dan fakta kerana gagal mengambilkira bahawa keterangan pembelaan langsung tidak dicabar oleh pendakwa yang mana membawa keraguan terhadap kes pendakwa.

f

22. Tuan Hakim yang mendengar kes ini juga telah membuat kesilapan dari segi undang-undang dan fakta kerana gagal mempertimbangkan sama sekali keterangan saksi pembelaan. Tuan Hakim hanya telah mengambilkira ciri-ciri keterangan yang memihak kepada pendakwa dan tidak mengendahkan ciri-ciri yang memihak kepada Pembelaan. Justeru itu telah membuat kesimpulan yang salah terhadap pembelaan.

After the defence was called, the accused gave unsworn evidence from the dock as SB1. SB1 denied that SP1 had come to the clinic as testified by SP1. SB1 denied he had promised to bring SP1’s medicine to the asramah that evening. He testified that he did not have a driving license at the time, and produced his driving license dated 6 February 1996. He said that on the relevant date he was on call duty and did not go anywhere. He also testified that he had diabetes and high blood pressure since 1984/1986 and that his diabetes was “uncontrolled” for 10 years, as a result of which he was impotent, and that this was supported by the results of the potency test conducted by SP7.

g**h**

He correctly concluded that SB1’s evidence was mere denial. The learned trial judge, in my view, concluded correctly that whether the accused owned a car or not is immaterial.

i

- a* SB2, a doctor was called to testify as to the diabetes condition. However SB2, as pointed out by the learned trial judge, did not clearly support the evidence of SB1. SB2 said his diabetic condition was controlled and not serious. SB2 also said that it is possible for a diabetic to achieve an erection. He also said there is no record that the accused was impotent. The evidence of SB2 did not support SB1.
- b* SB3 was called and he testified that SP1 was not registered on 18 April 1995 as a patient of Pusat Kesihatan Rawang. But SB3 conceded that he checked the record once only, and that SB1 was in charge and control of the records of patients at Pusat Kesihatan Rawang. The records had never been taken by the police for evidence.
- c* The defence that the accused did not have a driving license was not put to SP1. Neither was there any suggestion in the evidence of the appellant that he did not know how to drive.
- d* In a well-conducted trial, witnesses are called by the defence to give evidence in support of the issues that has been firstly put to the prosecution witnesses to contradict their testimony.
- e* Where a contradiction has been put to a prosecution witness, and no defence witness is called to give evidence in support of the opposing version, it could be concluded there is no evidential basis in the contradiction and therefore it carries little weight if at all.
- f* If the issue has not been put to relevant prosecution witnesses, but suddenly emerges during the defence stage without sufficient explanation, it could also be concluded it is not a *bona fide* defence but an afterthought or a fabrication after having heard the prosecution evidence, and therefore carry no weight at all.
- g* If the issue had been laid out in cross-examination of prosecution witnesses, and in the second stage of the trial the defence calls witnesses to give evidence in support, the court will then have to consider such evidence, its credibility as tested in cross-examination and re-established if necessary or at all in re-examination, and decide whether, even if it is not believed, it has still raised a reasonable doubt in the prosecution case. If so, then the court must acquit.
- h* In this case, the defences that SP1 had not gone to the clinic, that the appellant could not drive, achieve an erection had not been put to the relevant prosecution witnesses. Indeed, SP1 was questioned at length as to the procedure for going to the clinic, and his meeting the appellant at the medicine counter. It was not put to SP1 that the appellant could not drive. While SP1 was asked to recount the act which is the subject of the charge, it was not put to him the appellant was incapable of an erection, but instead he was asked whether the appellant was wearing a condom.
- i* The raising of these issues after SP1 had completed his

evidence and after the defense had been called, suggested strongly that these defenses are an after thought and therefore not *bona fide*. Clearly the learned trial judge had dismissed the defence evidence outright as not having raised any reasonable doubt.

23. Tuan Hakim pada halnya tidak perlu mempercayai penjelasan OKT tetapi hanya mengambilkira samada pembelaannya telah menimbulkan keraguan yang munasabah. Walaupun Tuan Hakim tidak mengambil kira atau percaya dengan penjelasan Perayu, Perayu tidak boleh disabitkan sehingga Mahkamah berpuas hati dengan alasan yang secukupnya bahawa penjelasan sebegitu tidak boleh membangkitkan suatu keraguan yang munasabah ("reasonable doubt") ke atas kes pendakwa.

This has been dealt with above. The next ground is:

24. Pemutusan Tuan Hakim yang mendengar kes ini adalah bertentangan dengan beban keterangan (evidential burden) dan langsung tidak berasaskan kepada keterangan yang sedia ada. Alasan Penghakiman Tuan Hakim justeru itu, adalah tercatat kerana ianya bukan satu keputusan yang munasabah dan berkepakaran ("reasoned and specialised judgment").

During the hearing of the appeal, upon counsel's application, the second sentence in this ground was amended to read "Alasan Tuan Hakim tidak bersesuaian dengan fakta kes". This ground is a general ground covering the grounds already dealt with above.

It is within the power of an appellate court to review the facts of a case: *Mohd Shariff v. PP* [1964] 30 MLJ 64. *PP v. Maarif* [1969] 2 MLJ 65, 66 that:

The case evolved purely on a question of fact and, bearing in mind that 'An appeal is merely a continuation of a trial, and throws open all the evidence to re-examination in order to determine whether or not the various findings of the court are correct,' I found it necessary in this case to review the whole of the evidence adduced by the prosecution. It is true that a magistrate's decision should not be reversed on the ground of its being against the weight of evidence. However, there is no reason why it should not be done if it were found that the decision was grossly against the weight of the evidence. It is perhaps appropriate to refer to a passage in *Mallal's Criminal Procedure*, 4th Edn, p. 467, which states that:

There is a distinction between the finding of a specific fact and a finding of fact which is really an inference drawn from facts specifically found. In the case of the latter the appellate court will more readily form an independent opinion than in the case of the former which involve the evaluation of the evidence of the witnesses, particularly where the finding could be founded on their credibility or bearing,

and

An appellate court may allow an appeal from a determination on a question of fact if it appears to the court that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. (In *re AB. Ltd.*(1)).

- a** But while an appeal is a continuation of a trial, it is not a retrial or a rehearing of the trial. An appellant must show that the trial judge had erred in law or in fact, and that such error had led to a wrong decision: see s. 307(6) Criminal Procedure Code. Where however, a decision on a finding of fact, particularly if it depends upon an evaluation of the credibility of a witness, an appellate court,
- b** not having seen or heard the witness in examination and under cross-examination, is ill-equipped to interfere. The appellate court must however be satisfied that the trial judge had not taken proper advantage of his having seen or heard the witnesses: *Yusoff bin Kassim v. PP* [1992] 2 MLJ 183 SC. To interfere merely because from the record the appellate court could have entertained some doubt is clearly wrong. It would interfere only if the decision is obviously wrong.
- c**

It is clear the learned trial judge, pursuant to the submissions made, had addressed his mind to the issues raised. I find nothing in the judgment of the learned trial judge that is grossly against the weight of evidence. The findings involve findings of fact founded on the credibility or bearing of the witnesses, where a trial judge

d has an advantage that the appellate court does not have. There is nothing upon which this court as an appellate court could conclude that no person acting judicially and properly instructed as to the relevant law could not have come to the determination under appeal.

- e** I would therefore dismiss this appeal.

I turn now to the following grounds which relate to the appeal against sentence:

- f** 25. Tuan Hakim telah membuat kesilapan dari segi undang-undang dan fakta-fakta kerana menjatuhkan hukuman yang terlalu berat dan bertentangan dengan prinsip undang-undang.
26. Tuan Hakim tersilap dari segi undang-undang dan fakta kerana gagal untuk “strike a balance as far as possible between the interest of the public and the interest of the accused”.
- g** 27. Tuan Hakim tersilap dari segi undang-undang dan fakta kerana gagal mengambilkira kepentingan perayu sedangkan ini merupakan kesalahan pertama perayu, memandangkan Perayu seorang pesakit kencing manis dan tidak mempunyai rekod jenayah yang lampau dan Perayu berusia 51 tahun dan akan kehilangan kerja dan semua sumber pendapatannya termasuk perkhidmatannya dan faedah pencennya.
- h** 28. Oleh yang demikian Perayu memohon agar Perintah Tuan Hakim Mahkamah Sesyen Shah Alam yang telah mendengar kes ini diketepikan dan satu Perintah sedemikian yang lebih wajar dan adil diberi demi mempertahankan keadilan hendaknya.

The learned trial judge at the end of the trial found:

- i**

Setelah mendengar dan meneliti segala keterangan dan hujjah-hujjah (fakta dan perundangan) dari segi keseluruhan kes, saya mendapati pembelaan gagal menimbulkan sebarang keraguan yang menasabah keatas kes pendakwa. Dengan itu tertuduh didapati bersalah dan disabitkan kesalahanya seperti pertuduhan. **a**

The learned trial judge had proceeded to hear submissions in mitigation. The accused was represented at all times by counsel. The counsel informed the court as follows: **b**

Peguam Bela: Berusia 51 tahun. Attendan Kesihatan. Kakitangan Kerajaan lebih 30 tahun. Seorang yang berumah tangga - seorang anak angkat berusia 14 tahun.

OKT akan hilang kerja dan faedah sampingan seperti pencen dan gratuiti. **c**

Pesakit Diabetes selama 12 tahun. Makan ubat tiap-tiap hari. Seorang yang tiada rekod lampau.

Mohon faktor-faktor diatas diberi pertimbangan dan bukan hukuman penjara. Perlu diberi peluang terakhir. Mohon Denda atau Jaminan berkelakuan baik. **d**

The grounds of decision as to sentence is as follows:

Hukuman:

Si pesalah/Perayu di dalam rayuan meringankan hukuman menyatakan beliau berusia 51 tahun telah berkhidmat dengan kerajaan selama 30 tahun, mempunyai seorang isteri dan seorang anak angkat. Ini adalah kesalahan pertama. Sabitan akan menyebabkan beliau kehilangan kerja dan faedah pencen. Mengidap penyakit kencing manis. Mohon hukuman denda atau ikat jamin berkelakuan baik. **e**

Sementara Timbalan Pendakwa Raya pula memohon hukuman 'deterrent'. Walaupun di akui ini adalah kesalahan pertama, Si pesalah/Perayu telah mengambil kesempatan di atas jawatannya. Mohon kepentingan awam di beri penekanan. **f**

Setelah memberi pertimbangan kepada rayuan meringankan hukuman dan rayuan Timbalan Pendakwa Raya, Mahkamah bersetuju bahawa kesalahan yang dilakukan adalah serius yang perlu dibendung. Masalah ini perlu ditangani dengan berkesan bukan sahaja untuk menyekat (deter) Si pesalah/Perayu malah 'would be offender' di masa hadapan. Hukuman maksima adalah Penjara 20 tahun DAN Sebatan. Memandangkan Si pesalah/Perayu telah berusia 51 tahun, maka hukuman sebatan dikecualikan, dengan itu adalah dengan rendah diri difikirkan hukuman Penjara sepuluh (10) tahun adalah sesuai; dan diharap dapat membendung kesalahan seperti ini di masa hadapan. **g**

In submission before this court, counsel submitted that a sentence of 10 years imprisonment is too severe, and that there was no evidence to show that this type of offence is so prevalent as to justify such severity. **h**

i

- a* Prevalence of this type of offence had not been a ground in the decision of the learned trial judge who had considered i) that the maximum sentence is 20 years imprisonment and caning, ii) the need to deter others from similar offence. The learned trial judge took into account his age in not passing a sentence of caning.
- b* Three authorities was cited by counsel in support.
- The first case is *Yap Teng Chai v. PP* [1959] 25 MLJ 205. In that case Hepworth J held that in fixing sentence, the nature of the offence, the circumstances and degree of deliberation must be taken into account.
- c* I do not agree the case supports the counsel's submission. This case shows pre-arrangement in going to a school asramah area to pick SP1, and the commission of the offence cannot be without deliberation since it requires erection and penetration. These activities cannot be accidental.
- d* The second case is *PP v. Nazarudin bin Ahmad & Ors* [1993] 2 MLJ 9. The headnote of the case included the passage that "The first and third accused being first offenders, the court should consider how the length of time spent in prison would affect them and society after they complete their sentence. Public interest sometimes demands that a short term of imprisonment be imposed as the prisoner would have difficulty in re-adjusting to family and community life if a longer term is imposed.
- e* The headnote reflected only part of the relevant portion in the judgment. The judge had in fact referred to the fact the first and third accused are young, and they are first offenders. The appellant in this case is not young. He is an adult, and in a position of authority at the clinic. The children from the school seeking medical attention would need to see him first at the clinic.
- f* The third case is *Lim Yoon Fah v. PP* [1971] 1 MLJ 37. In that case it was held that the public interest would be best served by helping the offender to turn from criminal ways to honest living and as there was a probability that the appellant would turn a new leaf, if given a chance, the appellant was put on bond under s. 294 CPC.
- g* The appellant in that case was 20 years 7 months old at the time of commission of the offence and there was a probation report. The probation officer reported that the appellant obviously had been misled by his companion in crime. The appellant was training successfully to be a motor mechanic.
- h* These cases only illustrate that while there are common general principles in fixing sentence, the judge fixing sentence must look at each case individually. He must consider firstly, the nature and seriousness of the particular offence; secondly, the deliberateness with which and the circumstances in which the offence was committed; thirdly, to give a discount for genuine regret; and fourthly, the balance between the public interests in deterrence not only of the accused but of others, and of enabling the accused a chance to turn over a new leaf.
- i*

Given that some offences may in their commission and circumstances be more serious than others, a sentence of 40% to 50% of the maximum sentence would be an appropriate median point to start with. It would sufficiently reflect the legislature's intent as to the nature and seriousness of the offence.

a

The second consideration comes next. In the event that the circumstances show that the commission of the offence was very much planned, it would warrant a sentence higher than that 40% to 50% of the maximum sentence. So also if the offence is committed against an infant, a child, the weak and defenceless and the old. If the offence was committed accidentally, it would warrant a substantial reduction from that median point.

b

As to the third consideration, a valid factor is whether an accused person is genuinely contrite and regrets what he has done. There are many ways to show such regret. It could be shown by cooperation with investigation, pleading guilty and making amends with the victim of the offence. Cooperation and pleading guilty saves considerable public money and time in investigation and prosecution as well as the time of the court. The public interest in such money and time being saved is considerable since the limited resources could then be utilised or directed to where it is most needed. In cases where a victim is involved, the making of amends with the victim, such as payment of compensation, would contribute substantially to the public's perception and acceptance that justice has been done. In such circumstances a very substantial reduction from the median point would be warranted. Thus on a plea of guilty alone, a discount of 20 to 30% from the sentence that would otherwise have been passed is warranted.

*c**d**e*

The fourth consideration is more tenuous. It would have to be a fine balance between the need for deterrence of others from committing similar offences, and a consideration of the likelihood of the offender from committing the same offence again. Regarding the latter, the age of the offender, that he is first offender, that he has responsibilities of which he may have become even more aware since the specter of imprisonment hung over him and similar circumstances come into consideration. But these matters on their own are secondary to the main issue, which is the balance between the public interest in deterrence and enabling the convict to turn over a new leaf.

*f**g*

It goes without saying that where all these factors are generally the same between two cases, it should result in almost identical sentences. That would demonstrate uniformity. That uniformity of sentencing principle would also be demonstrated by the fact that differing circumstances would result in differing sentences. It is trite that the medicine must not only fit the disease but also the patient.

h

The offence with which the appellant has been convicted has been described also as an offence against nature. Parliament has expressed its condemnation with a maximum sentence of 20 years imprisonment and caning. The learned trial judge took into consideration all of the matters raised in mitigation such as his age, length of service with the government, that he has diabetes, that this is his first offence,

i

- a* that he has a wife and an adopted child to support, and the conviction means that he would have lost his job. However, the learned trial judge also took into consideration the seriousness of the offence, and the fact that the appellant had abused his position of trust at the clinic to which the school students are regularly referred to. The learned trial judge has not failed to consider any matter brought up before him for his consideration in passing sentence.
- b*

The sentence of 10 years imprisonment, according to the yardsticks I have set out above, is not manifestly wrong or excessive as to warrant this court to interfere. Given however his age and his loss, I would order the sentence to be reduced to seven years imprisonment.

- c* I therefore dismiss the appeals against both conviction and sentence.

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